United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: August 5, 2003

TO : Willie L. Clark, Jr., Regional Director
Patricia Timmins, Regional Attorney
Howard D. Neidig, Jr., Assistant to Regional Director
Region 11

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: IUE/CWA (Enersys, Inc.) 536-2501-8000
Case 11-CB-3317 536-2507

This case was submitted for advice on whether the Union violated the Act when, in response to the Employer's defense to the Union's federal court WARN lawsuit, the Union sought in discovery employee signature cards allegedly supporting the Employer's claim of union loss of majority support.

FACTS

In February 1995, IUE/CWA (the Union) became the certified representative of a unit of production and maintenance employees at the Sumter, South Carolina plant of Enersys, Inc. (the Employer), a world-wide manufacturer of batteries. The Employer and the Union had a collective-bargaining agreement effective April 12, 1998 through April 15, 2001 covering those Sumter employees. The Employer in Spring 2001, gave the Union three separate notices of mass layoffs, but did not inform the Union that it planned a shutdown. The Employer specifically stated in the notices that the layoffs were temporary.

By letter dated June 14, 2001, the Employer withdrew recognition from the Union, claiming that it had withdrawal cards from a majority of the unit. In Fall 2001, the Employer notified individual employees of its intent to lay off more employees (although it still did not include a notice of closing). The Employer did not notify the Union. In November 2001, the Employer closed the Sumter plant.

On December 14, 2001, the Union filed a Worker Adjustment and Retraining Notification (WARN) Act (29 USC 2101 et seq.) action against the Employer, alleging in part that the Employer failed to provide the Union, as the employees' collective bargaining representative, the requisite plant closing notices. In response, the Employer asserted that it had no duty to notify the Union because it had withdrawn recognition from the Union. The Region has issued complaint alleging that the Employer violated Section

8(a)(1), (3), and (5), including by its withdrawal of recognition after it had participated in obtaining employee signatures on withdrawal cards.[1]

The parties are in the discovery stage in the WARN Act case. On April 7, 2003, the district court granted the Union's motion to compel discovery and ordered the Employer to comply with the discovery requests, finding the evidence requested to be relevant to the litigation. Those requests include a request for production of the cards signed by employees that indicate that they no longer wish to be represented by the Union. The district court to date has not ruled on the Employer's request for leave to file an interlocutory appeal of the discovery order to the Fourth Circuit.

On July 31, 2003, the district court granted the Board's motion, filed by the Special Litigation Branch, to intervene in the WARN Act case. The district court granted the Board's request for a stay for a period of 180 days of those aspects of the case that relate to the question of whether the Union is the employees' current representative, pending the Board's consideration of that issue in the unfair labor practice proceeding. The district court will review the stay in 180 days to determine whether a further stay is appropriate. In a stipulation with the Board, the Union agreed not to oppose the intervention; it also agreed not to oppose any discovery stay as to the cards for six months.

ACTION

We conclude that, absent withdrawal, the Region should dismiss the Section 8(b) charge. The Union's request for the withdrawal cards was not unlawful because those cards are directly relevant to the defense raised by the Employer to the Union's federal court action. Further, by intervening in the lawsuit, and seeking a stay of discovery as to the cards, the Board will protect the public interest in the confidentiality of these documents.

Under Rule 26 of the Federal Rules of Civil Procedure, federal district courts favor liberal discovery of all relevant material. In Maritz Communications Co.,[2] the Board recognized that principle and found that no unlawful conduct occurred in an employer's deposition of an employee/plaintiff in a federal court action alleging age

[1] 11-CA-18624, et al.

[2] 274 NLRB 200, 201-202 (1985).

discrimination in discharge. The employee's lawsuit raised allegations that made the employer's questions posed to the employee about his work history and union ties relevant; the employee should have been on notice that such inquiries would be likely. The information was particularly relevant where the unfair labor practice proceeding that arose out of the same set of circumstances alleged discrimination based on union activity, which might have been inconsistent with the age claim.[3]

On the other hand, there is a strong public interest in the confidentiality of employee expressions of interest in union representation.[4] Because of that public interest, a party seeking the identities of employees who indicated whether they supported a union must show an overriding justification, and the pursuit of relevant discovery must accommodate that public interest.[5] Thus, where discovery of employee cards is not relevant to a pending court claim, the Board has found that the party seeking that information violates the Act.[6] In Wright Electric, the employer alleged in a state court suit that the union intended to gain access to its premises not to organize, but solely to disrupt its business. The Board rejected the employer's assertion that the employee authorization cards were relevant to its claim.[7] The Board further stated in dictum that even if they were relevant to some degree, the confidentiality

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[3] Id.

[4] See, for example, Madeira Nursing Center, Inc. v. NLRB, 615 F.2d 728 (6th Cir. 1980)(FOIA does not compel disclosure of Union authorization cards and does not override employee privacy concerns); Pacific Molasses Co. v. NLRB, 577 F.2d 1172 (5th Cir. 1978)(same). Cf. In re John Irving, 600 F.2d 1027 (2d Cir. 1979)(where authorization cards were material to a defense of criminal charges, and where disclosing the information to defense counsel, and not to defendants, would accommodate the confidentiality interests, the fundamental right to due process took precedence over the public interest in confidentiality).

[5] Madeira Nursing Center, 615 F.2d at 731; In re John Irving, 600 F.2d at 1035-1037; Pacific Molasses Co., 577 F.2d at 1180-1183.

[6] Wright Electric, 327 NLRB 1194 (1999), enf'd, 200 F.3d 1162 (8th Cir. 2000).

[7] 327 NLRB at 1195. The Employer had asserted that the cards were relevant because they would indicate whether the Union had engaged in organizing.

interest in the cards outweighed the employer's interest in trying to use the cards to show union unlawful conduct.[8]

Here, as the district court found, the Employer's defense to the WARN Act complaint has made the cards relevant to that lawsuit. The Employer did not, before or after it withdrew recognition, give the Union notice of a shutdown. The Employer argues that it was not required to give the Union 60 days advance notice because it had lawfully withdrawn recognition based on cards signed by a majority of unit employees.

Because the cards are relevant to the Employer's WARN Act defense, the Union did not violate the Act by seeking that evidence.

In addition, since Special Litigation's intervention in the district court lawsuit will protect the Board's interest in maintaining the confidentiality of the cards, and the current unfair labor practice proceeding will protect employee Section 7 rights by determining whether the Employer's withdrawal of recognition was lawful, it is not necessary to issue complaint here in order to protect public or employee interests.

The Region should dismiss the charge, absent withdrawal.

B.J.K.

[8] Id.